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POLITICS AND THE SUPREME COURT: PRESIDENT ROOSEVELT'S PROPOSAL *

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While Senator Glass portrays Supreme Court justices as pure of heart, strong of mind, unerring in divination of the Constitution's meaning,¹ the Attorney General tests the aged justices' statesmanship and patriotism by their willingness to retire.² Perhaps, therefore, we should not take too seriously the hue and cry for or against the President's proposal of February 5th to enlarge the Supreme Court.³ When members of the American Liberty League thank God for the nine Justices and exalt the Constitution as the bulwark of our liberties, one suspects that they are thinking chiefly in terms of their own freedom as they see that freedom. When other opponents of the President's plan urge constitutional amendment instead of indirection and circumvention, the Attorney-General's condemnation of their

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1. N. Y. Times, March 30, 1937, p. 16, col. 1.

2. "If those judges [now of retirement age] think it would be harmful to the court to increase its membership, they can avoid that result by retiring upon full pay." Radio address of Feb. 14, N. Y. Times, Feb. 15, 1937, p. 2, col. 2, at col. 7.

3. The main provision of President Roosevelt's proposal, as it affects the Supreme Court, is that when a judge has served ten years and reached the age of 70 and has not, within six months thereafter, resigned or retired, the President shall appoint an additional judge. Under this proposal the number of judges thus appointed is not to exceed fifteen. For the text of the proposal, together with the Attorney General's supporting data, see N. Y. Times, Feb. 6, 1937, p. 1, col. 6.

suggestion as the "strategy of delay" is not altogether convincing.⁴ New Dealers were hardly unaware of the period *sometimes* required to ratify amendments, when in the 1936 platform they advocated this method, and none other, for handling the Court problem.⁵ It follows that if the President received any mandate concerning the Court in the November election, as certain of his supporters assert, it was to carry out the platform plan and not to circumvent it. Nor does the amendment process work so slowly as the New Dealers now ask us to believe. Of the last five amendments, that providing for direct election of senators was adopted in little under a year (359 days) after its proposal; the prohibition amendment in thirteen months (396 days); women suffrage in less than fifteen months (444 days); the Norris "lame-duck" amendment in somewhat under eleven months (327 days); and prohibition repeal in less than ten months (286 days). Are we to believe now that Jim Farley, plus his unique entourage of political organizers and propagandists, would fail where the heirs of Susan B. Anthony, of Wayne B. Wheeler, and the anti-Prohibitionists all succeeded? No, the issue lies somewhat deeper than arguments for and against the plan would lead one to believe.

The fundamental doctrine throughout our constitutional history, both state and national, is the separation of powers. Though this principle was not expressly written into the Constitution of 1787, separation of the legislative, executive, and judicial powers has long been, and is now, our safeguard against arbitrary government. The prime corollary of this doctrine—judicial review—originated warily enough by John Marshall in 1803, purports to insure realization of that great American ideal—"a government of laws." To let Congress define the limits of its own power, Marshall argued, "would be giving to the legislature a practical and real omnipotence."⁶ But to let the Supreme Court review congressional legislation, administrative acts, and state court decisions in so far as these involve the Constitution, would not endow the Court with any perilous supremacy because, as the Chief Justice explained, "It is, emphatically, the province and duty of the judicial department to say what the law is."⁷ No problem of construing an oracular Constitution is involved; constitutional interpretation consists in

4. "Those who were violently opposing the President's recommendation insist that the reforms he seeks to bring about should be accomplished by amending the Constitution and that method alone. This is the strategy of delay and the last resort of those who desire to prevent any action whatever." Radio address of Feb. 14, 1937, *N. Y. Times*, Feb. 15, 1937, p. 2, col. 2, at col. 8.

5. "If these problems [social and economic] cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendments as [we] . . . shall find necessary, in order adequately to regulate commerce, protect public health and safety and safeguard economic liberty. Thus we propose to maintain the letter and spirit of the Constitution." Democratic Platform of 1936, *N. Y. Times*, June 26, 1936, p. 1, col. 5.

6. *Marbury v. Madison*, 1 Cranch 137, 178 (U. S. 1803).

7. *Id.* at 177.

finding clear meanings which can be clear only to judges. To them the meaning of the Constitution is obvious, but to others, even legislators and the executive, its meaning is necessarily hidden and obscure. These outsiders simply have not this transcendental wisdom. The only final and authoritative mouthpiece of the Constitution is the Supreme Court, and its every version, gleaned from a sort of "brooding omnipresence in the sky", inevitably has the virtue of never mangling, distorting or changing the original instrument.

John Marshall, in *Osborne v. The Bank of the United States*,⁸ observes further: "That [the judicial] department has no will in any case . . . Courts are mere instruments of the law and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge, but always . . . for the purpose of giving effect to the will of the . . . law."⁹

Mr. Justice Roberts, in *United States v. Butler*¹⁰ (the AAA case), one hundred and twelve years later, explains:

"It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty,—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy."¹¹

We turn thus from "the will of the law" to "the article of the Constitution" in what seems an effort to evade the responsibility of judges for their own decisions. But people generally "are beginning to learn that judicial decisions are not babies brought by constitutional storks"¹² (Marshall) or, one may add, by constitutional bricklayers (Roberts). It has long been recognized that either transcendental or mechanical jurisprudence is beyond human power. Jefferson saw more clearly than his juristic cousin in 1819, and than Mr. Justice Roberts in 1936, when he described the Constitution as "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."¹³

8. 9 Wheat. 738 (U. S. 1824).

9. *Id.* at 866.

10. 297 U. S. 1 (1936).

11. *Id.* at 62.

12. Lerner, *The Fate of the Supreme Court* (1936) 142 NATION 379.

13. 4 RANDOLPH, MEMOIRS, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON (2d ed. 1830) 917.

This shaping and twisting of the Constitution is no phenomenon new to our day and generation. Nor is Franklin D. Roosevelt the first President to use harsh words about the Court. Judicial deviations from the separation of powers and judicial distortions of the fundamental law have occurred from the beginning of our history. Jefferson, Jackson, Lincoln and Theodore Roosevelt were just as outspoken in questioning, even impugning, the pristine purity of judicial conduct. Jefferson and Jackson claimed an authority to construe the Constitution equal to that of the Court itself, contending that if President and Congress were bound by the Court's version of the Constitution and not by their own, the effect would be "to place us under the despotism of an oligarchy."¹⁴ Abraham Lincoln refused to treat the decisions of the Supreme Court as permanently binding upon the people, lest they cease "to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."¹⁵ Theodore Roosevelt interpreted Lincoln's position as involving the proposition that the people are "the masters of the Court, and that it was for the people and not for the Courts to determine the principle and policies in accordance with which our Constitution was to be interpreted and our Government administered."¹⁶ In his message to Congress in 1908, President Theodore Roosevelt said: "The chief law-makers in our country may be, and often are, the judges. Every time they interpret contract, property, vested rights, due process of law, they necessarily enact into law parts of a system of philosophy; and as such interpretation is fundamental, they give direction to all law making."¹⁷

Such executive criticism might be minimized, perhaps even ignored, as motivated merely by political prejudice and partisanship unworthy of the Presidential office, were it not that judges themselves have bitterly criticized their own Court. In 1875 Justice Miller wrote:

"I have for thirteen years given all my energies and my intellect to the duties of my office, and to the effort to make and to keep our Court what it ought to be. . . . But I feel like taking it easy now. I cant (sic) make a silk purse out of a sows (sic) ear. . . . I can't make Clifford and Swayne, who are too old resign, nor keep the Chief Justice from giving them cases to write opinions in which their garrulity is often mixed with mischief. . . ."

"In denying the right they [judges] usurp of exclusively explaining the Constitution, I go further than you [Roane] do. . . . For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given . . . to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow . . ." *Id.* at 316-317.

14. 15 LISCOMB, WRITINGS OF THOMAS JEFFERSON (Mem. ed. 1903) 276-278. For the similar views of Jackson, see Corwin, *Curbing the Court* (1936) 185 ANNALS 45, 51-52.

15. Quoted by Corwin, *supra* note 14, at 53.

16. Cited in 79 CONG. REC. (1935) 14694.

17. 43 CONG. REC. (1908) 21.

"It is in vain to contend with judges who have been at bar the advocates for forty years of rail road companies and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence."¹⁸

It is now recognized, to borrow the language of the then Judge Cardozo in 1921, that:

"Deep below consciousness are . . . the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."¹⁹

This may account for such self-denying ordinances as the Court has from time to time imposed upon itself. Of these none is more frequently put forward by judges than the maxim that all reasonable doubts on constitutional issues must be resolved in favor of the legislature;²⁰ another that the Court will never pass upon the wisdom or unwisdom of legislative policy.²¹ Though the Court still claims to adhere strictly to both these self-limiting devices, actually both are increasingly disregarded. To maintain verbal devotion to the rule that all reasonable doubt must be resolved in favor of constitutionality and at the same time to set aside a statute by a five to four vote seems in plain terms an unforgivable insult to the integrity and good judgment of the four honorable colleagues in dissent.

The second rule has been as openly ignored. In *Lochner v. New York*²² Justice Holmes indicted his colleagues for reading into the Constitution economic views gleaned from no more respectable a source than Herbert

18. Letter of Dec. 5, 1875, quoted in Fairman, *Justice Samuel F. Miller, A Study of a Judicial Statesman* (1935) 50 POL. SCI. Q. 15, 42-43.

19. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 167-168.

20. "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." Mr. Justice Washington in *Ogden v. Saunders*, 12 Wheat. 213, 270 (U. S. 1827).

It must be conceded that the growing disposition on the part of Congress and the President to disregard considerations of constitutionality, on the theory that such matters can somehow be straightened out by the Courts, places a great strain on the judicial rule of constitutional presumption. This has been especially true under the New Deal.

See the President's famous letter of July 4, 1935, to Representative Samuel B. Hill, in which he remarks: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." 16 CONG. DIG. (1937) 75.

A more striking instance of this tendency is the Frazier-Lemke Act, which was signed by the President with full knowledge of its defects. The perfected statute which replaced the original act [set aside in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935)] was recently upheld by a unanimous court. *Wright v. Vinton Bank*, 57 Sup. Ct. 556 (1937). Is it reasonable to expect the Court to follow its rule of constitutional presumption when the Congress and the President endorse legislation avowedly defective?

21. HUGHES, *THE SUPREME COURT* (1928) 37.

22. 198 U. S. 45 (1905).

Spencer's *Social Statics of 1851*.²³ Nor is this an isolated instance. In unguarded moments certain judges have expressly condemned legislation before them and have done so primarily on grounds of policy. Justice Brewer once said that "the paternal theory of government" was "odious" to him.²⁴ Justice Field described the Income Tax Law of 1893 as an "assault upon capital";²⁵ Justice Peckham denounced the New York bake-shop law as "mere meddlesome interferences with the rights of the individual."²⁶ These two judges purported to be declaring the law and applying the Constitution, contending that they were powerless to do more. But in *Nebbia v. New York*²⁷ Mr. Justice McReynolds insisted openly that the Court should consider legislation not only in terms of power, but also in terms of policy: "But plainly, I think, this Court must have regard to the wisdom of the enactment."²⁸ The Court has increasingly taken the wisdom of legislation into account. "Thus the process of psychoanalysis has spread to unaccustomed fields."²⁹ Judges themselves agree that "this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue",³⁰ which means, of course, an end of our so-called government of law, even in theory. As evidence of this, witness the increase of dissenting opinions, especially in New Deal cases, where dissenting justices (conservative and liberal alike) point an accusing finger at their "erring" colleagues, expressly rebuking them for allowing personal preferences and predilections to decide cases at bar.³¹ Said Justice Stone

23. *Id.* at 75.

24. *Budd v. New York*, 143 U. S. 517, 551 (1892).

25. *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 607 (1895).

26. *Lochner v. New York*, 198 U. S. 45, 61 (1905).

27. 291 U. S. 502 (1934).

28. *Id.* at 556.

29. Mr. Justice Cardozo (Brandeis and Stone concurring), dissenting in *United States v. Constantine*, 296 U. S. 287, 299 (1935).

30. *Ibid.*

31. When the Court in Feb., 1935, handed down the famous Gold Clause decisions (294 U. S. 240), Mr. Justice McReynolds remarked extemporaneously: "Nero undertook to exercise that power [of debasing the currency]. Six centuries ago in France it was regarded as a prerogative of the Sovereign. . . . It seems impossible to overestimate what has been done here today. The Constitution is gone. The people's fundamental rights have been preempted by Congress." As reported in speech of Senator Robinson, *N. Y. Times*, March 31, 1937, p. 12, col. 1, at col. 8.

Dissenting in the New York Minimum Wage Case, *Morehead v. New York*, 298 U. S. 587 (1936), Mr. Justice Stone observes: "It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest." *Id.* at 633.

"There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute in the public interest." *Id.* at 632.

"It is not for the Court to resolve doubts whether the remedy by wage regulations is efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless

in the AAA dissent: "The suggestion that [the spending power of Congress] must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused."³²

Now "fiat" is no flaccid word. And surely any line of judicial reasoning that does not rise to the dignity of argument is in itself an abuse of power as well as of words. "A tortured construction of the Constitution" Justice Stone continues, "is not to be justified by recourse to examples of reckless Congressional spending . . ." ³³ But, as usual, the Court in the AAA case pretended entire innocence of having twisted the Constitution, and again professed devotion to its own well-established rule that "the Court neither approves nor condemns any legislative policy."³⁴ This procedure has become, as it were, a juristic ritual gloomily recited to introduce the Court's thought as it moves relentlessly toward the statutory morgue.³⁵ Instances of judicial encroachment on the separation of powers might be easily multiplied, but this is unnecessary. It is now clear that with no other check on the Court's power than what Justice Stone, perhaps ironically, called its "own sense of self-restraint", even the most important self-denying ordinances are dissolved.

Judicial obstinacy sanctified itself in the *Washington Minimum Wage* case, decided March 29, when Justice Sutherland as spokesman for the dissenting conservatives rejected every item in the formula of "self-restraint" and "reasonable doubt", as laid down by Justice Stone in his AAA dissent. Referring to such views as "both ill-considered and mischievous", Justice Sutherland explained that the Justice's oath "is not a composite oath but an individual one". Therefore the Judge is under a sacred obligation to cast the vote that invalidates an act of Congress and does so against the firm conviction of four of his colleagues, because no reasonable doubt arises in his own mind.³⁶

government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted, in the name of liberty, the system of theology which we may happen to approve." *Id.* at 636.

When the Supreme Court invalidated the Guffey Coal Act, the majority threw out the whole statute, refusing to permit its sections to be adjudged independently, as Congress directed. Chief Justice Hughes upheld the price-fixing sections, contending that Congress had the right to separate the titles. Incidentally, he accused the majority of having entered "the realm of pure speculation". *Carter v. Carter Coal Co.*, 298 U. S. 238, 322 (1936).

32. *United States v. Butler*, 297 U. S. 477, 487 (1936).

33. *Ibid.*

34. *Id.* at 464.

35. Compare the language of McBain, *The Issue: Court or Congress*, N. Y. Times, Jan. 19, 1937, § 7, p. 1, col. 1.

36. *West Coast Hotel v. Parrish*, 57 Sup. Ct. 578 (1937).

In the AAA Case, Mr. Justice Stone (dissenting) had reminded his colleagues of two guiding principles that "ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom." The other is that "while unconstitutional exercise of power by the executive and legislative

The judiciary has made itself a political body, not for vote getting, but as the final arbiter of both state and national policy. And policy is politics. Functioning as a super-legislature, even as an amending body, the Court increasingly substitutes its own views for those of Congress and the electorate, even though as many as four judges—presumably as competent and sincere as the five—urge that the enacted policy should stand. The increase of judicial negatives in our own generation is bound to alarm any thoughtful citizen. Between 1789 and 1865 the Court pronounced void only two acts of Congress; between 1920 and 1932 twenty-two acts were thus overturned; in the three years, 1934 to 1936 inclusive, thirteen acts were judicially beheaded.³⁷ This rapid conquest by a small but determined judicial oligarchy compels governmental paralysis and strains our democratic processes beyond what they may be able to bear. I take this to be the point of Justice Stone's concluding remarks in the AAA case:

"Courts are not the only agency of government that must be assumed to have the capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says" ³⁸

Justice Stone's observations strike at any government usurpation, including executive. And prior to the favorable ruling in the *Washington Minimum Wage* case and the five decisions of April 12 upholding the Wagner Labor Disputes Act, there was ample support for President Roosevelt's generalizations of March 5th regarding the destructive effect of these recent Court rulings. Speaking before 1300 democrats, nearly all office holders, who had just eaten \$100-a-plate dinners, the President said: "I defy any one to read the opinions concerning AAA, the Railroad Retirement Act, the National Recovery Act, the Guffey Coal Act and the New York Minimum Wage Law, and tell us exactly what, if anything, we can do for the indus-

branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the Court but to the ballot and to the processes of democratic government." 297 U. S. 477, 495 (1936).

37. For the decisions of the Court holding acts of Congress unconstitutional (with citations of the statutes and summary of the grounds of the rulings) through 1924, see WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT (2d ed. 1935) 273.

For a complete list of cases (1790-1937) in which seventy-six acts of Congress have been declared unconstitutional, see GILBERT, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT (1936).

38. *United States v. Butler*, 297 U. S. 1, 87 (1936).

trial worker in this session of the Congress with any reasonable certainty that what we do will not be nullified as unconstitutional.”³⁹

Reasonable citizens must sense the seriousness of the situation now confronting us—the President, the Congress, and the country at large. This crisis is due in a considerable measure to Supreme Court opinions that spell governmental incompetency and futility—inability to meet dire social and economic needs. This brings us to the President’s Proposal of February 5th.

There is, of course, nothing novel in Mr. Roosevelt’s plan to pack or unpack the Court so as to make its political complexion accord with Presidential purpose. Just as judicial deviation from strict adherence to the separation of powers is not new in our history, so the executive has on several occasions been given congressional authority to appoint judges and thus influence judicial decisions. The Court was established with six members in 1789, but after John Adams’ defeat by Jefferson in 1800 it was reduced (in 1801) to five so as to keep the judiciary Federalist; the act of 1802 brought it back to six justices and that of 1807 enlarged it again to seven; a congressional act of 1837 increased the Court from seven to nine, partly to eliminate what remained of Marshall’s influence; in 1863 the Court was temporarily given ten members in order to dilute anti-war sentiment; the act of 1866 reduced the Court from ten to a future total of seven, to prevent judicial appointments by President Johnson.

Interestingly enough, the most famous case of “packing” the Court did not immediately result from increased membership. On the same day (Feb. 7, 1870), and at the very hour when Chief Justice Chase was reading his opinion setting aside the Legal Tender Act of Feb. 25, 1862,⁴⁰ President Grant nominated Joseph P. Bradley (to fill Grier’s place) and William Strong (after the Senate’s rejection of Hoar) as associate justices. Strong was confirmed on Feb. 15, Bradley on March 21. Four days after Bradley’s confirmation, Attorney General Hoar moved for a re-hearing of the Legal Tender Cases. On May 1, 1871, the Court upheld the constitutionality of the Legal Tender Acts by a vote of five to four,⁴¹ the membership having been, in the meantime, increased to nine under the Act of 1869. Grant was immediately accused of having “packed” the Court in order to obtain this decision. The question has long been debatable and debated, but recently published material from Hamilton Fish’s diary has cleared up the controversy.⁴²

To say that Grant packed the Court may perhaps be an exaggeration, but it is clear that the President chose the two justices not only because he

39. N. Y. Times, March 5, 1937, p. 14, col. 7.

40. Hepburn v. Griswold, 8 Wall. 603 (U. S. 1870).

41. Knox v. Lee, 12 Wall. 457 (U. S. 1871).

42. NEVINS, HAMILTON FISH, THE INNER HISTORY OF THE GRANT ADMINISTRATION (1936) 306. See also Ratner, *Was the Supreme Court Packed by President Grant?* (1935) 50 POL. SCI. Q. 343.

was convinced of their fitness, but because he believed, and even knew, that they would sustain the Legal Tender Acts. As Fish remarks, Oct. 28, 1876:

“ . . . Although he [the President] required no declaration from Judges Strong and Bradley on the constitutionality of the Legal Tender Act, he knew Judge Strong had on the bench in Pennsylvania given a decision sustaining its constitutionality, and he had reason to believe Judge Bradley’s opinion tended in the same direction; that at the time he felt it important that the constitutionality of the law should be sustained, and while he would do nothing to exact anything like a pledge or expression of opinion from the parties he might appoint to the bench, he had desired that the constitutionality should be sustained by the Supreme Court; that he believed such had been the opinion of all his cabinet at the time.”⁴³

With the incumbency of Ulysses S. Grant, a safe and sane man once more occupied the Presidency—a man whom the Forty-first Congress could trust to appoint members to the Supreme Court. Moreover, Congressional fears for the constitutional safety of Reconstruction legislation had already been proved well-founded,⁴⁴ so Congress was not slow in taking steps to obtain a more friendly Court. Four days after Grant’s inauguration, a bill was introduced in the Senate⁴⁵ increasing the Court’s membership to nine, and on March 23, the measure was passed by the Senate without a recorded vote.⁴⁶

Meanwhile, on March 29, the chairman of the House Judiciary Committee, John A. Bingham of Ohio, proposed a substitute for the Senate bill.⁴⁷ It is this substitute House proposal to which President Franklin D. Roosevelt referred on March 9, as a precedent for his Court reorganization plan of February 5th. The President said:

“There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.”⁴⁸

43. NEVINS, *op. cit. supra* note 42, at 306-307.

44. In *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866), the Court unanimously held that Milligan, a civilian living in Indiana, could not be held by a military commission set up by the President outside the theatre of war. Alarm became acute when the Court assumed jurisdiction in the case of *Ex parte McCordle*, 7 Wall. 506 (U. S. 1868), where a Mississippi editor sought a writ of habeas corpus to escape the toils of a military commission created under reconstruction legislation. Congress met the situation by repealing the appellate jurisdiction of the Supreme Court as to habeas corpus writs, the immediate effect being to remove the *McCordle* case from the Court’s jurisdiction. See, in this connection, 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) c. 29, 30.

45. CONG. GLOBE, 41st Cong., 1st Sess. (1869) 29.

46. *Id.* at 219.

47. *Id.* at 337.

48. N. Y. Times, March 10, 1937, p. 15, col. 4.

Bingham's House substitute proposal did not disturb the Senate measure of March 23 for an immediate enlargement of the Supreme Court to nine, but went further by omitting any definite limit whatever to the size of the Court. Under the House substitute proposal any federal judge seventy years of age, after ten years in service, might file with the President a statement that he wished to retire, and thereafter receive full salary for life and retain the honors and privileges of office should he wish to exercise them. Bingham's plan provided, however, that the President was to appoint a successor immediately. Moreover, if a judge of the prescribed age were too incompetent, incapacitated, or obstinate to file a certificate of retirement, it might be filed for him after evidence taken before any judge of the Supreme Court. In a separate section it was provided that, should any judge reach the age of seventy and not file a certificate of retirement within one year, the President should nevertheless appoint a successor.⁴⁹

Representative Bingham frankly admitted that any judge thus superannuated might continue to sit upon the bench, or might return to the bench to cast his vote in critical decisions. The purpose of the plan was clear; superannuated judges would be expected to know that their active service had ended. Even if they were stubborn enough to refuse to recognize it, their successors would be sitting with them and thus diluting or correcting the judgment of the Court. Representative Bingham, in explanation, declared ". . . that at least two (Nelson and Grier) of the present justices of the Supreme Court of the United States, although they may live for years, will not long be able, by reason of the infirmities of age, to take their places upon the Supreme bench."⁵⁰ Justice Grier had suffered an attack of creeping paralysis, and while he was not mentioned by name, the apt description of him made further identification superfluous. Said Mr. Bingham:

"It is well known that one of the most eminent members of that bench is not able to-day to reach the bench without being borne to it by the hands of others. It is but fit and proper that such a man should be given the opportunity to retire upon his salary, carrying with him his honors of office and holding his commission until the day of his death. I do not say that he will retire. But this amendment will give him the authority to retire, and it will be giving him notice that it is the will of a great people . . ."⁵¹

To justify the proposition, Mr. Bingham urged further:

"In this way we will be able to secure for the people, from time to time as the emergency may arise, a Supreme Court capable physically as well as mentally of meeting the requirements of the Constitution and

49. See especially §§ 5 and 6, CONG. GLOBE, 41st Cong., 1st Sess. (1869) 337.

50. *Ibid.*

51. *Id.* at 337-338.

discharging all the trusts reposed by the Constitution in the Supreme Court of the United States, and also in the inferior courts created by your laws." ⁵²

Strong opposition to the scheme came from the Democrats. Said Representative Michael C. Kerr of Indiana:

"It is an attempt, by indirection, not to increase the number of judges, so as to augment their working capacity to do the business of the court, but it is personal in its application to certain members of the court, and it is a mode devised to get rid of them, to retire or supersede them. Those are the judges over the prescribed age of seventy years. They represent the most highly conservative part of the court, and by their age, great learning, unselfish patriotism, and chastened or satisfied ambition, they contribute invaluable influence to divorce the entire court from the control of politics, and to place it above the suspicion of bias from the changing and distracting events, motives, and demands of the outside world. Displace them, and put in their seats younger men, of more ardent impulses and ambition, more fully identified in sympathy and feelings with the current events in the country, and you will do infinite prejudice to the exalted character and influence, if not to the judicial impartiality and purity of that great tribunal." ⁵³

Continuing his denunciation, Mr. Kerr proclaimed:

"It seems to me that this provision will introduce into our judicial system and into the control of Congress over it a most dangerous principle of interference, one that will go to the very fundamental idea upon which that court was organized, upon which its great service as a coordinate department of the Government must always rest. It will go directly, most logically and most dangerously, to disturb the independence of that department of the Government, and to place it, as well as all others, under the power of the legislative department . . ." ⁵⁴

Despite the bitterness of such opposition, the Bingham scheme passed the House on two roll-call votes. On the first, to substitute the committee proposal for the Senate bill, the yeas and nays stood 99 to 50, with 47 not voting; and on the passage of the bill the vote stood 90 to 53, with 53 not voting. ⁵⁵ In neither call of the roll did a single Democrat cast an affirmative vote. ⁵⁶

In the Senate, however, the Judiciary Committee introduced an amendment which virtually discarded the Bingham proposal. The chairman, Senator Lyman Trumbull of Illinois, explained:

52. *Id.* at 338.

53. *Id.* at 341-342.

54. *Id.* at 342.

55. *Id.* at 344-345.

56. Possible exception might be made in the case of Anthony A. C. Rogers, who voted for the House Committee substitute. Rogers was sometimes classed as a Democrat, having been defeated for Congress on the Democratic ticket, and later elected as "the people's candidate." But, according to the biographical sketch in the Congressional Directory, he had been for years identified with the Republican party. CONG. DIR. (1928) 1475.

"The Committee on the Judiciary thought this objectionable, as it would continue the persons upon the bench as judges still although they were retired. There would be nothing to prevent their coming back in an emergency and sitting on the bench, and we might have twenty judges of the Supreme Court. It would involve a difficulty as to what should constitute a quorum of it, and there might be some question as to the propriety of allowing those persons to be still judges who were unable to perform the duties." ⁵⁷

The above Senate committee amendment permitted judges to resign voluntarily at seventy years of age and thereafter to receive full pay for life. The House, after a further amendment to require ten years of service before retirement on full pay, accepted the arrangement, and the bill became law.⁵⁸

Though all this congressional tampering with the Court was obviously intended to validate or invalidate current political policy, its constitutional propriety was not and cannot be successfully challenged.⁵⁹ Nevertheless, a feeling that such legislation might in the future push the separation of powers off-balance from the executive-congressional side is indicated by a resolution introduced by Senator William Pinkney Whyte of Maryland, on Dec. 21, 1880, to amend the Constitution so as to fix permanently the number of judges and thus bring an end to congressional meddling with the Court's membership for partisan purposes.⁶⁰ Arguing in behalf of his resolutions, Senator Whyte pointed out that one of the great objects of the Federal convention was to secure the independence of the judiciary.⁶¹ To this end judges were guaranteed tenure during good behavior at a fixed salary. The Constitution was silent on the number of judges to compose the Court, yet if the provisions as to salary and tenure could contribute so much to the independence of the judge, "how essential is it," Senator Whyte inquires, "to the security of the collective body, the Court, to have its number permanently established?" ⁶² The Senator argued that the number of judges was not fixed by the framers for these reasons:

"At that experimental period it was scarcely possible to have done so, because of the plastic, formative state of the nation, and in view of the many unsettled questions concerning the extent of territory of which the Union would be constituted. . . . Besides this, the desire

57. CONG. GLOBE, 41st Cong., 1st Sess. (1869) 574.

58. *Id.* at 630.

59. For a dreary recital of the constitutional argument in support of the President's plan, see the address of former Justice John H. Clarke, *N. Y. Times*, March 23, 1937, p. 18, col. 3.

60. 11 CONG. REC. (1881) 286-287.

61. Senator Whyte said, in this connection, using the language of another [referring to *The Federalist*]: "The independence of the judiciary was the felicity of our Constitution. It was this principle which was to curb the fury of party on sudden changes. The first moments of power gained by a struggle are the most vindictive and intemperate. Raised above the storm, it was the judiciary which was to control the fiery zeal and to quell the fierce passions of a victorious faction." *Id.* at 286.

62. *Ibid.*

to fix no more than was absolutely essential and the great difficulty of harmonizing the convention on any form of government, with other considerations which might be suggested, had their influence in leaving this matter an open question." 63

Senator Whyte was disturbed lest Congress, in the exercise of its discretionary control over the membership of the Court, destroy judicial independence.

"If, then, in our form of government the supreme judicial tribunal, the last resort on constitutional questions, is to be the check upon the national legislation, what sort of check can there be when the power to be checked can by the increase of judges reverse the decision restraining the legislative encroachment?" 64

Pointing to the numerous Congressional changes previously made in the Court's membership, he expressed a fear lest:

"the time may come when the confidence of the people in the great tribunal may be shaken. . . . It should be put beyond the power of any political party, holding the Legislative and Executive departments of government, in any gust of faction, by doubling the Court, to annihilate its independence and make it subservient to party." 65

Even granting (and this requires considerable generosity) that congressional increases or reductions have served to promote public advantage, the remedy was, and is, at best ad hoc and temporary. History proves this. Senator Whyte's resolution of 1880 was not adopted, but the number of judges has since remained stationary at nine. (This, of course, has been possible largely because of substantial changes as to jurisdiction and procedure). This, however, did not take politics out of the Court. In no period in our history have judges been so active in translating their own pet economic and social theories into principles of constitutional law as since 1890.⁶⁶ Such activity was, and is, entirely unwarranted and unconstitutional. Doubtless Justice Holmes, in 1913, had this obvious truth in mind as he wrote: "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law." 67

63. *Ibid.*

64. *Ibid.*

65. *Ibid.* Senator Whyte took cognizance of the need for increased membership due to the crowded docket resulting from the great increase of business in all the federal courts. A resolution to deal with this situation [10 CONG. REC. (1880) 209] had already been unanimously adopted. What he feared was Congressional tampering with the Court's membership for political purposes. It may be added that Senator Whyte did not seem to fear judicial tampering with Congressional legislation for political purposes.

66. This generalization is amply supported by 2 BOUDIN, GOVERNMENT BY JUDICIARY (1932) 192-552.

67. HOLMES, *Law and the Court* in COLLECTED LEGAL PAPERS (1921) 295.

To rig the membership of the Court up or down is not enough. Any proposal that goes no further than increasing the number of judges, while leaving the power they wield intact, mistakes the nature of the problem to be solved. I am opposed to the President's proposal not because it goes too far, but because it does not go far enough. Speaking in behalf of the plan on March 30, Senator Robinson declared:

"The proposed legislation does not touch the power of the Court. It in no way, either expressly or impliedly, reduces or restricts the authority granted by the Constitution to our supreme judicial tribunal."⁶⁸

Furthermore, the President's proposal moves in the wrong direction. Shorn of sophistry and sham about age and judicial inefficiency,⁶⁹ the President's plan to enlarge the Court to fifteen members implies a purpose to get approval of legislation which, by the standards the present Court has sometimes set, is unconstitutional. Evidently, President Roosevelt wishes judicial endorsement of his legislative enactments under the Constitution as it now stands. But it is extremely doubtful whether all these enactments would be upheld by new appointees worthy of a seat on the high tribunal. It will be recalled that a unanimous Court set aside NRA,⁷⁰ the Frazier-Lemke Act,⁷¹ and President Roosevelt's removal of Humphrey from the Federal Trade Commission.⁷² Eight judges voted against "Hot Oil" regulation.⁷³ Thus if the President is to achieve his objectives, it may be at the expense of judicial independence; if, on the other hand, judicial integrity is preserved, his proposal will fail of its purpose, so far as certain of his key measures, such as NRA, are concerned.

The great majority of the American people may wish to see a good part of the New Deal program validated, but do they wish to see this done by specific appointments made at the expense of a tradition basic to our con-

68. N. Y. Times, March 31, 1937, p. 12, col. 1.

69. See, in this connection, Chief Justice Hughes' letter to Senator Wheeler pointing to the satisfactory condition of the Court docket. N. Y. Times, March 23, 1937, p. 1, col. 6.

One month prior to the President's announcement of his Court proposal, Solicitor General Stanley Reed reported to Congress as follows: "One of the principal factors which has enabled the Supreme Court to keep abreast of its own appellate docket was the passage of the Jurisdictional Act of Feb. 13, 1925 . . . without restricting the possibility of review, this act has enabled the Court to give more time to important legal issues and has reduced routine demands upon it. . . . A greater number of cases were docketed at the last term, a greater number disposed of, and a smaller number carried over to the succeeding term than at any other term since the enactment of the act of 1925, except the 1933 term." ATTORNEY GENERAL OF THE UNITED STATES, ANNUAL REPORT FOR 1936 (1936) 11.

These plain words taken from the Attorney General's Report seem to contradict the latter's statement accompanying the President's Message to Congress proposing the Court plan. Furthermore, the Attorney General's report of January 6 appears to be at odds, as above shown, with the President's original message and also with his "fireside chat" of March 9.

70. Schechter v. United States, 295 U. S. 495 (1935).

71. Louisville Joint Stock and Land Bank v. Radford, 295 U. S. 555 (1935).

72. Rathbun v. United States, 295 U. S. 602 (1935).

73. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

stitutional system? While it is true that judges may be appointed to find a power in conformity to Presidential desire (and indeed the Court has already discovered power sufficient to uphold the Wagner Labor Disputes Act even though such liberals as Brandeis, Cardozo, and Stone were unable in the *Schechter* case to find any such magic formula), there is questionable wisdom in relying upon mere judicial versatility to validate governmental enactments of the first magnitude.

Mr. Roosevelt's proposal is, moreover, a two-edged sword. Congressional authorization to add judges seeing eye to eye with the President, may be used under Mr. Roosevelt for the general welfare. But what of his successors? It may be recalled that Hitler's rise to power was allegedly constitutional. The Enabling Act of March 24, 1933, which surrendered the last fortress of German constitutional government was supposedly authorized under Article 48 of the Weimar Constitution. Just so Mr. Roosevelt's proposal, though within the constitutional power of Congress, may end by breaking down an essential of our constitutional system. It removes, or threatens to remove, the last forum for minorities whose civil and political rights have been denied, even outraged, by huge political majorities led by astute and facile politicians. The record is full of instances, particularly in post-war years, demonstrating the need for a Supreme Court to uphold the most elementary rights of free speech, right of assembly and fair trial.⁷⁴

Effective operation of our democratic institutions requires an independent judiciary as a check on the political branches of the government, and for the reason given by Judge Cardozo when a member of the Court of Appeals of New York:

"The utility of an external power restraining the legislative judgment (preserves) the great ideals of liberty and equality against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles. . . . By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."⁷⁵

But Cardozo's endorsement of judicial review is, as we shall see, not unqualified. He knows that the final justification of the law is the welfare of society.

Some think the situation can be handled by blanket amendment enlarging the powers of Congress or by a series of amendments conferring specific

74. See the excellent Note (1937) 46 YALE L. J. 862. See also *Powell v. Alabama*, 287 U. S. 45, 58 (1932), and the cases there cited.

75. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 92.

powers upon Congress. Past experience, however, casts doubt on the efficacy of such proposals, for it is difficult to frame an amendment in language sufficiently unequivocal to escape risk of judicial emasculation. Certain important clauses of the Fourteenth Amendment were reduced almost to nullity by the *Slaughter House*⁷⁶ and *Civil Rights* cases.⁷⁷ Not until almost the turn of the century, when our state legislatures sought to deal with industrial conditions along lines approved and practiced by the most progressive nations of the world, did the judges erect the due process and equal protection clauses into impassable constitutional barriers safeguarding their own laissez-faire predilections. Everyone knows how the Court construed the Sixteenth Amendment in disregard of what its words plainly say.⁷⁸

The simplest method of dealing with the Court problem lies in the hands of the Court itself. The justices might agree among themselves that they will not invalidate an Act of Congress unless two-thirds of them agree that it is unconstitutional. There is sound reason for the Court's taking such action. Such a judicial act is not only the decision of a private lawsuit; it is the adjudication of a public controversy. Surely the overthrow of a national statute is as important as a verdict of guilty in an impeachment trial or the rejection of a presidential veto, each of which requires two-thirds majority. However strong the reasons for such a judicial rule of procedure, it is not likely to be adopted because of the well-known political maxim that power is seldom relinquished voluntarily. Nevertheless it may be recalled that when public complaint had been made against the nullification of important state legislation by less than a bare majority of a quorum (a minority of the whole Court), Chief Justice Marshall publicly announced that the practice of the Court was that the Court would not "except in cases of absolute necessity" decide cases "where constitutional questions are involved" except by a majority of the whole Court.⁷⁹

What is needed is a Constitutional amendment that will save the country not only from ignorant opposition to change on the part of the Supreme Court, but also from ignorant change whether by a patronage-hungry Congress or by an enterprising President. Is there any way whereby we can enjoy the advantages of judicial review, as enumerated by Cardozo, without suffering the disadvantages of judicial oligarchy heedless of the necessity of moulding the law and the Constitution to fit changing conditions? Merely adding new judges is not, I think, the solution. Whether the Court is large or small in membership, young or old in years, judicial oligarchy will continue unless some means is found of over-riding arbitrary

76. 16 Wall. 36 (U. S. 1873).

77. 109 U. S. 3 (1883).

78. *Eisner v. Macomber*, 252 U. S. 189 (1920); *Evans v. Gore*, 253 U. S. 245 (1920).

79. BEVERIDGE, *Common Sense and the Constitution in THE STATE OF THE NATION* (1924) 55; also BEVERIDGE, *The Supremacy of the Supreme Court* in *id.* at 264.

decisions. There is no assurance that young judges will be any more amenable to popular will than were their older brethren. When Justice Holmes spoke of judges as "apt to be naif, simple-minded men", needing "education in the obvious",⁸⁰ it is fair to conjecture that he was not thinking merely of judges past seventy years of age.

I submit, therefore, that the method best calculated to gain enactment of the necessary and desirable parts of the President's program, without doing violence to judicial independence, is a constitutional amendment authorizing Congress (perhaps after an intervening congressional election on the issue) to over-ride by a two-thirds vote the judicial invalidation of an act of Congress. But, some one objects, this would allow Congress by two-thirds vote to amend the Constitution. Precisely, and so much the better. Is there any sound reason why the judiciary should continue to possess what amounts to an almost exclusive right to amend the Constitution merely in the exercise of its authority to decide cases and controversies? Why should we depend entirely on the Court to discover its errors and make corrections? We are too likely to forget the reminder of Charles Warren: "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."⁸¹ Also, in the words of the Court itself, ". . . legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as Courts."⁸² Even John Marshall, arch-exponent of Judicial supremacy, subscribed, perhaps in a moment of fear, to this proposition:

"I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the judge who has rendered them unknowing of his fault."⁸³

The obvious advantage of the above over-riding amendment is that it would maintain adequate judicial review over executive and legislature and it would at the same time permit Congress to overturn any decision setting aside a law which the voters are determined to have enacted. In short, this suggested constitutional change (as now urged by Senator Wheeler) might save us from a dictatorship facilitated by governmental paralysis resulting from the obstinacy of a bare majority of Supreme Court judges. It would also obstruct the path of any dictator who, in the name of democracy and with the plea of urgent necessity and impending crisis on his lips, might use

80. HOLMES, *Law and the Court* in COLLECTED LEGAL PAPERS (1921) 295.

81. 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) 470-471.

82. *Missouri, Kan. and Tex. Ry. v. May*, 194 U. S. 267, 270 (1904).

83. *Marshall to Chase*, Jan. 23, 1804, quoted in 3 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919) 177.

means so deviously constitutional as to endanger our democratic system of government.

When judges construe the Constitution as if blind to changing needs, when they value their own opinions too highly and block effort to serve the ends for which alone government exists, judicial power must be curtailed. As Cardozo declares: The courts can and should be permitted to exercise the authority now theirs "if only the power is exercised with insight into social values and with suppleness of adaptation to changing social needs."⁸⁴ The problem is therefore to find a corrective for particular judicial decisions that do not meet this test; the Court cannot be allowed to obstruct the basic processes of popular sovereignty. Whether judicial power be exercised with insight into social values, as Cardozo insists it should be, is not finally for the President but for the electorate to determine. One may well doubt whether any net social gain would result from substituting the maxim, not much used since Jackson's day, "the Constitution is what the President says it is," for the now famous aphorism of Chief Justice Hughes (made while Governor of New York State), "the Constitution is what the judges say it is." The final appeal should be neither to the Court nor to the President but, as I have tried to show, to the ballot box and to the operating principles of constitutional government.

84. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 94.